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ADDRESS

By Kathleen M. Sullivan
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The Wednesday luncheon session
of The American Law Institute
convened in the Colonial Room
of The Westin St. Francis, San Francisco, California,
on May 18, 2011.
President Roberta Cooper Ramo presided.

President Ramo: Gentlemen and ladies; members of the bench, the bar, the academy; people from New Mexico: Good afternoon. This has been a quite amazing day and a quite amazing series of days for those of us who have been lucky enough to hear all of the great presentations that we have heard.

One of the hardest jobs of being President of The American Law Institute, maybe the only hard job, is putting together these programs. And once Lord Phillips had said that he was going to come and give our opening speech, you know, the first President of the Supreme Court of Great Britain, a man so intrepid, I should tell those of you who were not here on Monday, that he went swimming in the ocean, incredibly enough, leading me to wonder about that phrase, what was it, an Englishman? Anyway. (*Laughter*) And also worrying, because I know his wife, that I would have to send him back sort of as a "Lord-cicle," I was really very worried about this. (*Laughter*)

Then I thought, well, now that is such a huge coup; how in the world can we end our Meeting in San Francisco and have people feel equally enlightened and honored and pleased and also want to come to lunch? And the answer came to me as I was actually reading something about her and I thought: Kathleen Sullivan. Well, there was only one problem: I didn't know Kathleen Sullivan.

So I did what I always do in this situation. I called Lance and said, knowing that he would know Kathleen Sullivan, "Get Kathleen Sullivan." And he hemmed and hawed and said, "She's so busy, and I just don't know. And, you know, it's hard, and now she's kind of in New York a lot and this is really hard." And then, about 20 minutes later, he called me back and said, "She said yes." (*Laughter*) Well, then as far as I was concerned, no matter what happened the Meeting was going to be a success.

Let me say, you have all had a chance to read everything important about Kathleen in our Program. She follows in the footsteps really of Mike Traynor, assuring me that I didn't need to say anything nice about her and just to cut to the chase and that would be fine, but I want to say one important thing.

In the best of the American legal world, we have the best minds active in our courts, and that is because we all understand how enormously important it is to have people who understand not just the law in cases that are presented before them but how important it is to have people who understand that the impact of the major cases of our time have enormous impact on the democracy.

Kathleen Sullivan, the first woman dean of the Stanford University Law School, the first woman dean of any of their colleges, I was surprised to read—not surprised that it was her, surprised that there hadn't been one—is an extraordinary legal intellect. What is equally important to us as an Institute is that she is an extraordinary practitioner. She brings all of the force of her great intellect, of her marvelous education, and of the wide way in which she sees things into the courts in a way that has enormous impact for everybody. It is a great honor for me, and little did I know she was an opera fan; had I known that, I would have prepared an aria to welcome you, Kathleen. Ladies and gentlemen, Kathleen Sullivan. (*Applause*)

Ms. Kathleen M. Sullivan: Thank you, Roberta, for that far too generous introduction. And ladies and gentlemen, it is an extraordinary honor to speak to this august and distinguished crowd, full of so many people I have admired for so long and so many people I have known as colleagues and even as former students. It is a really great honor to be here, so thank you very, very much for asking me to do this, and I didn't hear that a swim in the ocean was required before the talk, so I feel I have been remiss, but maybe we can do that later.

My topic for today is not a misprint. I asked the question "Is constitutional law law?" And it might seem like the answer is self-evidently yes, but the provocation for the talk is the increasing tendency of discussion of the development of constitutional law in the Supreme Court, in the popular press, in nakedly political terms.

Newspaper coverage has gone over to simply describing the "liberal" and "conservative" Justices, the "usual ideological line-up," the "usual suspects," and it becomes even more confusing when cases come down

that are described as if they can be assigned political labels but the political labels seem to have gone topsy-turvy.

So I'd like to start with a few examples from recent Terms in which it seems that the seeming liberal position is held by conservatives or the seeming conservative position is held by liberals.

The examples I'd like to begin with are free speech and federalism. I'd like to describe them, and then I'd like to talk about three different interpretations we could have of that seeming topsy-turviness. Let me just begin with freedom of speech.

For decades in the 20th century, one would have thought that freedom of speech was a constitutional value espoused mostly from the left by dissidents of various stripes: Socialists, Syndicalists, Communists, anarchists, Maoists, people who took left-wing dissenting positions and saw freedom of speech as a vehicle for criticism of entrenched or incumbent power. By contrast, it would mostly have been thought to have been a conservative position to favor the regulation of speech that could be destructive of political peace or social values. And yet, last Term, when we look at some of the most controversial speech cases that came down from the Court, it looks topsy-turvy. I'll just take two by way of example: Citizens United against the Federal Election Commission [558 U.S. ___, 130 S. Ct. 876 (2010)], held five to four that it was a violation of the First Amendment for the federal election campaign laws to put an absolute ban on the use of corporate treasury funds for independent political advertisements in support of the election or defeat of a candidate. That was five to four, with the so-called "conservative" Justices—and I will use these in scare quotes throughout the talk because I think they are very simplistic and misleading labels—but the so-called conservative majority issued a decision authored by Justice Kennedy and joined by Chief Justice Roberts and Justices Scalia, Thomas, and Alito over a vigorous dissent by the so-called "liberal" Justices, Stevens joined by Justices Ginsburg, Breyer, and Sotomayor, saying that the speech restrictions on corporate funding in political campaigns should have been upheld against First Amendment challenge.

Or consider a second example in which it seems odd that it's the conservatives who favor freedom of speech and it's the liberals who favor restriction of speech and reject the First Amendment argument: a less well-publicized case but one that involves a law school just a few blocks from here, the University of California at Hastings College of the Law. This was a case that came up from the Ninth Circuit called Christian Legal Society v. Martinez [130 S. Ct. 2971 (2010)], and in this case the University of California at Hastings College of the Law had denied official student-organization status to a Christian Legal Society that declined to have gay members. The society claimed this was an infringement of First Amendment rights. The school said, no, no, we are just denying you a subsidy or an official imprimatur, we are not restricting what you can do in the marketplace of ideas, we are just restricting our embrace of you, our subsidy to you, our imprimatur of approval upon you, and the Supreme Court agreed with the school and not the First Amendment proponents here. It was the so-called liberal Justices who rejected the free-speech claim, Justice Ginsburg in a decision joined by Justices Stevens, Breyer, Sotomayor, and in this case Justice Kennedy, over vigorous dissents from the so-called conservative Justices, with particular passion in the dissent written by Justice Alito, joined by Chief Justice Roberts and Justices Scalia and Thomas. So you see the point. If you think that free speech is a liberal value, here its vigorous embrace is from the conservative side and the advocacy for government restrictions is coming from the so-called liberal side of the spectrum. It seems upside down.

A second example is federalism. Those of my generation who grew up with the experience of the New Deal and the Great Society, and I think it's fair to say much of the generation before mine, think of national power and the centralization of national values and national market control in the federal government as something that comes from the liberal or progressive side of the political spectrum and thinks of the states' rights or federalist tradition as something that comes from the traditional right or conservative side of the political spectrum. If you trace a line from secessionism to states' rights-based resistance to the

desegregation of schools after Brown v. Board [of Education, 347 U.S. 483 (1954)], one thinks of federalism traditionally as emanating from the right and nationalism as emanating from the left. But if you look at a line of cases involving federalism issues over the last few years in the Supreme Court, again, it could look topsy-turvy.

Just take preemption cases, and I am going to make it my task to try to make preemption interesting to you. The Supremacy Clause of Article VI [U.S. Const. art. VI, cl. 2], of course, says that "the Laws of the United States . . . shall be the supreme Law of the Land," the laws of the states "notwithstanding." It is a notwithstanding clause. It just says there is a principle of priority here, and yet the notion that ambiguous federal statutes should be deemed to displace contrary state laws you might have thought would be traditionally associated with liberals, who wanted national civil-rights laws, national environmental laws, national consumer-protection laws, to displace the backwaters of tyranny, recalcitrance, or oppression back in the state governments controlled by the tyranny of local majorities. It's a very Madisonian notion.

But if we look at who is for federal power in the preemption cases in recent years, there has developed a very consistent majority in favor of preemption in cases of ambiguous express-preemption clauses or in implied-preemption cases, where you are really building a structural interpretation into the conflict between federal and state laws. There has been a concerted majority in favor of preemption coming from the seeming right of the political spectrum consistently. You have Justices from Chief Justice Roberts to Justices Scalia, Alito, and Thomas, often joined by Justice Kennedy but not always, taking the position that national laws displace state laws, displace state product-liability lawsuits, and you have the so-called liberal Justices arguing for states' rights. Now, sometimes, admittedly, it might be like arguing for blue states' rights, as opposed to just states' rights.

Take the very interesting Term, two Terms ago, where there were three failed preemption challenges, one Wyeth against Levine [555 U.S. 555 (2009)]. The court held narrowly that federal food-and-drug and

labeling laws did not preempt a common-law claim under Vermont law that a warning label had been insufficient on an antinausea drug that was misadministered and caused a musician to lose her arm from gangrene, a very poignant case, six to three, no preemption.

The same Term, the Court rejected a preemption challenge to a statutory Maine-based claim that light cigarettes had been misleadingly labeled under state law even if properly labeled under federal law [Altria Group, Inc. v. Good, 555 U.S. 70 (2008)].

And in a third case, the states' rights of New York, a third perhaps blue states'-rights victory emanated when in Cuomo v. The Clearinghouse [Cuomo v. Clearing House Ass'n, L.L.C., 129 S. Ct. 2710 (2009)], the Court held that it was not preempted for a state attorney general to investigate a nationally chartered bank for predatory lending or discriminatory lending notwithstanding the Comptroller of the Currency's seeming exclusive visitorial powers.

Now who were the leaders in those cases? Well, the most consistent leader of the states'-rights position in the preemption cases was none other than Justice Stevens, who just retired last Term. Never was there a more consistent voice for the state side of preemption issues in case after case, starting with his decision in the *Cipollone* cigarette-advertising case [Cipollone v. Liggett Group, Inc., 505 U.S. 504 (1992)] two decades ago, and Justice Stevens would actually lead these liberal groups that sometimes prevailed, as in the three cases I just described, and sometimes in dissent.

I don't want you to think, oh well, preemption, it's just a case-by-case statutory-interpretation issue, each tub on its own bottom. There were animating principles here, and Justice Stevens would sometimes actually write, "This is a case about federalism." And you would have to look twice and say this is Justice Stevens talking about federalism; this is not the late great Chief Justice Rehnquist or Justice O'Connor, who were the intellectual architects of the Rehnquist Court's federalism revolution. This was someone coming from the avowed liberal side, so-called, of the Court.

So preemption is another area, as with free speech, in which recent Terms seem to indicate that the Court not only seems to have political labeling going on, but everything seems upside down. It seems the inverse of what you might have thought historically was the kind of approach Justices would take to these issues.

So now let me turn to the three possible ways we could interpret that sort of topsy-turviness. Why would a seeming liberal value like freedom of speech migrate to the conservative side of the Court? Why would a seeming conservative issue like federalism migrate to the seeming liberal side of the Court? Why would you have a kind of epiphany that states' rights were good after all if they allow product-liability lawsuits to go forward in Vermont, or statutory claims to go forward in Maine, or attorneys general to fill a vacuum of federal regulation in New York?

Well, the first answer, and you will see quickly that I will reject it, would be that constitutional law is not law after all; constitutional law is a thinly veiled vehicle for the realization of political positions in which the Justices have sympathies for parties and for the causes they espouse and the interests they represent, and merely use constitutional law as a vehicle for the realization of those interests.

Now this reminds me of a story I heard when I first moved out to California and came to a judges' conference, and there was a distinguished federal judge who got up and wanted to disabuse anyone of the view that judges were like this but did tell the story of a judge, an ex-prosecutor, who used to come into court and say, "Good morning. Is the defense ready?" "Yes, Your Honor." And then turn to the prosecution and say, "Are we ready?" (*Laughter*)

Now he told the story in order to disavow it, but it's not far off from what a lot of the popular discussion, what I think is a very debased popular discussion of these decisions suggests when the newspapers or press coverage label these decisions, "The conservatives voted for the corporate interest in the case," or that sort of thing.

Now I reject it because I just don't know any judge or justice who thinks that way, who wakes up in the morning and says, "What can I do

for the National Chamber of Commerce today?" or "What can I do for the plaintiffs' bar today?" It's just not an analysis that reflects any judicial thought process of which I am aware, so I will put that to one side.

Let me turn to a second possible interpretation that is different but not quite the one I am ultimately going to agree with. The second answer to the question might be that constitutional law is not exactly law; maybe it's something a little bit more like our traditional conception of equity. That is, just as equity has extralegal animating principles, like mercy or justice, that shine through the legal technicalities or particular facts of any given case, so maybe we can best explain these shifting tides of constitutional interpretation as animated by extraconstitutional principles, both larger than and outside the constitutional doctrines that they inform, and yet we can trace them somewhat systematically as helping us to understand why Justices might shift on freedom of speech or on federalism in a particular case.

One metaphor that helps me think about this is the metaphor of a prism, that constitutional law is a prism through which these extraconstitutional principles shine, and they may refract differently, the light shining through the prism may refract differently in different cases. This is not an uncommon way of analyzing constitutional law. I think of it as very much like what my late great colleague and predecessor as dean at Stanford Law School, John Ely, said in *Democracy and Distrust* [*: A Theory of Judicial Review* (1980)], that democracy was an extraconstitutional animating principle that helped you understand what seemingly disparate constitutional-law doctrines had in common.

So let's go back and try that approach to these cases, and I think if we take the speech cases to start with, I think that *Citizens United* illustrates that there were really two concepts of freedom of speech that divided the majority and the dissent.

The majority in *Citizens United*, which was probably more aptly called "Citizens Divided," given how controversial it was, sees free speech as promoting a value of liberty, a notion that you should be free to do with your own resources things that are untrammeled by govern-

ment intervention. Governments will always have a tendency to overreach and will try to entrench themselves into the future. The key to freedom is to allow people to act with their own resources to resist government oppression.

So if your conception is liberty, you don't like government interference with the use of private resources, even if they are the well-financed causes of big people, as opposed to what Justice Black once called in Martin v. Struthers [Martin v. City of Struthers 319 U.S. 141, 146 (1943)] "the poorly financed causes of little people." You are for liberty no matter who the speaker is, and if you take this view, you think you are indifferent to the relative wealth or power of speakers. After all, the First Amendment speaks in terms of disallowing abridgment of the freedom of speech, not the abridgment of the rights of particular speakers.

And on that view, I am not suggesting for a moment that these Justices would not equally favor the free-speech rights of dissident or minority or poorly financed causes of little people, and we saw that in the Westboro Baptist Church case [Snyder v. Phelps, 562 U.S. ___, 131 S. Ct. 1207 (2011)] just a few weeks ago, when there was a lopsided majority in favor of the free-speech rights of a group whose message and mode of delivering it is anathema to most people. But the Court disallowed the application of the tort of intentional infliction of emotional distress against the Westboro Baptist Church lopsidedly, so I am not suggesting that the liberty principle is going to come out the other way on free-speech cases involving the content-based suppression of dissident or left speech. I'm just suggesting that it is broad enough to encompass the speech of corporate treasuries as well.

But let's contrast that view, where liberty is what's driving the free-speech analysis, with what I think is driving the dissent in *Citizens United*, and that is a conception that freedom of speech serves the value of equality, political equality ultimately. What it does is enable people with little political power to speak in ways, including in public forums and other quasi-subsidized public spaces, in ways that can help to challenge entrenched power, and if equality is what is driving your views about

freedom of speech, then you are for free-speech rights for the poorly financed causes of little people. But you're not going to be for freedom of speech when it comes to the well-financed causes of big people or the power of people to speak with corporate treasury funds amassed for other purposes.

And I think you can see some consistency in the views of the dissenters in *Citizens United* and other cases. They will, generally speaking, favor the application of First Amendment principles to conditions on government benefits, not always, not in the *Martinez* case I described earlier, the Hastings case, whereas the conservatives who favor the liberty-based conception of freedom of speech will, generally speaking, not find conditions on government benefits to be a problem. Why? Because liberty doesn't care about what the government does with its resources; it cares about what the government does to use of private resources.

So long story short, if you see constitutional law as simply a vehicle by which larger and extraconstitutional animating principles like liberty and equality play out, then you can see these cases as consistent at the higher level of generality with the speech principle, even if they seem inconsistent at the lower level of generality.

Now let's turn to trying to do the same kind of prism-based analysis of federalism. I have thought very hard about how to possibly find an external animating principle in this seeming flip-flop in the preemption cases on who is for states' rights and who is for federal power. I think the explanation really comes down to competing views about the value of civil litigation in our society as a vehicle for resolving problems. This really reminds me of an anecdote that first got me thinking about it.

I was lucky enough to have a Marshall Scholarship, by which the government of Great Britain sent me to Oxford for several years in gratitude for the Marshall Plan. It was something that was deeply meaningful to me. I had never traveled abroad, and it was a wonderful thing. Years later, I became involved in trying to keep the Marshall Scholars Association going in the United States. We got Prince Charles to be our honorary patron, this was some time ago, and he came over to the

United States to meet with all the Marshall Scholars. The great moment came on the rope line where I was about to meet him, and I got up to this position and he said, "Well, how do you do? What do you do?" And I said, "Well, I'm a professor of constitutional law at Harvard Law School," and he said, "Don't you think Americans are terribly litigious?" (*Laughter*)

The implication was this was a bad thing, and I tried to suggest all the ways in which actually we don't have too many lawyers, we have too few, and actually a lot of lawyers in our society fill roles in the civil service and other things that are filled by nonlawyers in his system. I thought it was a pretty good answer. I wasn't sure it was persuasive to him.

And then four years later, he came back to see the Marshall Scholars Association again, and I certainly remembered him, (*laughter*) but when I got to the place in the rope line, it was not at all clear he remembered having met me, and he said, "What do you do?" And I said, "I am a professor of constitutional law at Harvard Law School," and he said, "Don't you think Americans are terribly litigious?" (*Laughter*)

And I realized that it was a very intelligent conversation, but that that was his conversation for the law professors. (*Laughter*)

So imprinted in my mind forever, and what really leads me to the next observation, is that from the point of view of other societies, I think that we do appear to rely to an extraordinary extent on not only litigation but on litigation through civil juries, especially at the state level, to resolve problems that are resolved differently by other systems and that this may seem to create a certain amount of ad hoc quality to policymaking, or windfalls, or lack of expertise, or deadweight social loss, or lottery-based redistribution, any number of the critiques that are familiar to this audience.

Now if you start thinking about that orientation toward whether civil litigation is out of control in our society or not, then the preemption cases fall like a kaleidoscope into a clear kind of pattern. You can then see why in the preemption cases, especially those that are about

federal statutes preempting state common-law causes of action that are vindicated by jury trials in state court, you can then see that the Justices who align in favor of national power, economic nationalism, federal preemption, Hamiltonian national markets, one regulator in Washington instead of 50 regulators in the 50 states, the uniting theme is this will tend to reduce the role of civil litigation, jury-driven outcomes, and that form of mini-democracy as a way of resolving social problems in favor of the expertise of federal agencies, whether it's national-highway vehicle-safety standards that tell you whether you need a shoulder belt in addition to a lap belt or an air bag in addition to a seat belt, federal administrative agencies that decide, as the Court just decided in Bruesewitz against Wyeth [131 S. Ct. 1068 (2011)], the case I was privileged to argue on the winning preemption side for Wyeth, that a complicated federal administrative regime that decides what routinely administered childhood vaccines should be in the market and should be administered to children, that it is better to have federal expertise through the combined efforts of the FDA and the Centers for Disease Control and so forth making these cost-benefit decisions, rather than juries deciding in a particular case whether a vaccine could have been better designed.

Those who are oriented toward believing that federal expertise and cost-benefit analysis is better than civil juries will tend to find on the preemption side of these cases even where there is statutory ambiguity, and those who think that juries are an important, almost quasi-democratic, bottom-up way of speaking truth to power and overcoming entrenched corporate interests and the capture of federal agencies will tend to favor the anti-preemption side in these cases, but you can't understand the line-up just by looking at federalism.

You have to understand the line-up by looking behind federalism to the concern about civil litigation. Now I actually think that, if you extend that, you can actually explain some other connections, even running back to the Rehnquist Court. The hallmark of the Rehnquist Court, in many people's minds one of its most important constitutional revolutions, was to revitalize judicially imposed restraints on the powers of Congress, whether under restrictions on the Commerce Clause [U.S.

Const. art. I, § 8, cl. 3], invalidating the Gun-Free School Zones Act [of 1990, struck down by the Court in United States v. Lopez, 514 U.S. 549 (1995)], and the Violence Against Women Act [struck down in part by the Court in United States v. Morrison, 529 U.S. 598 (2000)] in part on the grounds that they exceeded Congress's commerce power, or limitations on Congress's civil-rights-enforcement power, or the resurrection of new ideas of state sovereign immunity that limited damages actions against the states.

When you look back at that, it looks like it's just all about federalism, only this time the so-called conservative Justices are voting for states' rights and against federal statutes, but it actually links up with the Roberts Court preemption cases in that it was a litigation-reducing trend. By limiting the power of federal statutes to create new causes of action, to enable people to go to federal court, to enable people to get damages in federal court, it was a litigation-reducing trend.

Now, you might say, "Well, is this what Justices are really thinking about? You've already said they don't wake up thinking what can I do for the trial lawyers today or what can I do for the Chamber of Commerce today?"

And I don't mean to suggest that's what this is about. I think this is a deeper concern with the role of civil litigation that plays out in the federalism cases. I think it is a concern that manifests sometimes expressly. Think back a few years ago to the Stoneridge case [Stoneridge Inv. Partners, LLC v. Scientific-Atlanta, 552 U.S. 148 (2008)]. It's one of many Roberts Court statutory-interpretation cases that limits implied private rights of action, in that case against third-party aider-and-abettor claims under 10(b) and 10b-5. There was an explicit moment in Justice Kennedy's opinion where he said, you know, if we have too much litigation against companies that are listed on public American exchanges, they will go to Singapore or London or Hong Kong to another exchange, and we mustn't allow civil litigation to damage the American economy in that way. So those are explicit moments when you see that these policy concerns are there.

And I don't mean to suggest that this is a result-driven way that one wakes up and thinks about the case, it's just that with all the tools of statutory interpretation, the statute's language, its purpose, its context, its history, you can be pushed in these cases in either direction. And I think you might say, just as democracy, to John Ely, pushed the Warren Court in certain ways on voting-rights cases, so a concern about the scope of civil litigation in our society may be driving these federalism cases so strongly that it seems to turn people upside down with respect to commitments to national power and to states' rights.

Well, that's the second possible interpretation, constitutional law is not exactly law, it's more like equity; there are these extraconstitutional animating principles.

But let me end with the third and what to me is the most persuasive interpretation of these kinds of seeming flip-flops. The third and last possibility is that these apparent inconsistencies show that constitutional law really is law, law in the sense that the constitutional values are themselves constant. Freedom of speech is about the limits on entrenched and incumbent governmental power and the cultural freedom people have to express dissent. Federalism is about the balance of power between a central government and localized governments and the comparative advantages of those and the need to keep a balance between them in order, as Madison wrote in Federalist 51, to keep a double security for our liberties, security for our liberties through horizontal separation of power and through vertical separation of power between the center and the localities.

On this third view, you would say that there's really nothing at all troubling about the state of freedom of speech or federalism. It's not they that moved. It's not that freedom of speech moved right or that federalism moved left. Actually those principles are transcendent, they are trans-substantive, they are constant, and they express value decisions that are far more long range than any particular public debate. And if that's your view, then actually it should not be a surprise that particular political contingent lineups at any given time appear to migrate. In fact,

that should be a source of reassurance—and now the analogy will be not to Ely but to Rawls—that if we were in the original position and we were to not know which side of a federalism or free-speech debate our particular contingent interests would line up on, we would certainly want those principles to transcend any debate in which we should find ourselves on one side or the other. In other words, you just don't want to wake up one day and say, "I am always for federalism" or "I am always for freedom of speech." You might think those should always be the values of your society, but they won't necessarily always be ones with which you agree.

So, on this view, it shouldn't be a surprise that people who are avowed nationalists for purposes of the civil-rights laws and who think states' rights is a damaging and destabilizing concept that allows local tyranny, if you view federalism as a constant that sometimes leads to correction in eras when the lineups change, then you might not be so surprised that after a long-seeming vacuum of federal regulation of banking, consumer privacy, climate change, greenhouse-gas regulation, or any number of other issues, you might not be surprised that some people think, well, suddenly the states are the place where regulatory energy needs to fill that vacuum. That shouldn't be a surprise.

Or you shouldn't be surprised if you've spent a long time thinking, well, it isn't important what the government does with its resources, it's fine if you don't give money to smutty, blasphemous performance artists from the National Endowment for the Arts. You all remember the great lines about that approach: Justice Oliver Wendell Holmes wrote about a loquacious Irish policeman in Boston who talked politics on the job, got fired, and lost his First Amendment claim, and Holmes, then sitting on the Massachusetts Supreme Judicial Court, said he "may have a constitutional right to talk politics, but he has no constitutional right to be a policeman." [McAuliffe v. Mayor of New Bedford, 29 N.E. 517, 517 (1892).]

Another version of that same point came from Justice Scalia in National Endowment for the Arts v. Finley [524 U.S. 569, 595-596

(1998) (Scalia, J., concurring)], in which he said it may be your right to "*épater les bourgeois*," but you have no right to "hav[] the bourgeoisie taxed to pay for it." (*Laughter*)

So you might take this view for a long time that actually there is no such thing as an unconstitutional condition on government benefits, since they are matters of government largess, not a matter of constitutional right. But then, in Christian Legal Society v. Martinez, you see the very same Justices who have expressed those views in one context concerned that if a liberal, politically correct law school excises a Christian group from its roster of approved student groups because it has an anti-gay membership criterion, there is a concern that, oh dear, that might actually have some kind of coercive effect emanating beyond the condition into the society at large.

So if you take this third view, that these principles, freedom of speech or federalism, are transcendent, trans-substantive, permanent, you shouldn't be so surprised when people actually line up on the other side of those issues in a particular case or a particular setting. That's just a sign that the principle transcends the current political debate.

So I searched for a metaphor for the third view. It's not a prism so much as that constitutional law, in this third view, serves as a kind of hull or keel. That is, it's a stabilizing influence that can help navigate constitutional-law doctrines through changing political times and political contexts in a way that constantly provides correction when we go too far in one direction or the other. Or another metaphor that was once suggested to me by a friend is that it's like jujitsu, when you try to turn the force of your opponents' views into an argument for your own position in a subsequent case.

So I conclude by saying I think this third view is an optimistic view of what seem like apparent inconsistencies or flip-flops or topsy-turviness in the way that so-called liberals and so-called conservatives line up on different issues. I think it suggests that constitutional law is law and that we shouldn't be confused that it is what is doing the migration when the winds change and the hull corrects.

And so I will conclude just by noting that it's been an inspiration to watch Justice Stevens in his retirement year. He just gave a magnificent speech to a group of lawyers in New York on Law Day in which, with a captive audience, he decided he would spend a little bit of time talking about his favorite Robinson–Patman Act [15 U.S.C. § 13] cases from his youth, which you only want to do with a captive audience. (*Laughter*) I find that when I think back to the wonderful few moments I got to encounter Justice Stevens at an international conference of judges, and I asked him, looking for an anodyne question to ask the great man when we were in close proximity on a minibus in Florence, "What is it that the judges of other nations most admire about your Court?" And he said without hesitation, "What judges of other countries most admire about our Court is our ability to have our decrees obeyed," which is something that you can't take for granted elsewhere. I think my third conception of constitutional law as law, one that says that the loser shall accept their losses because they know they may be winners a different day under the same concept, I think that the third concept of constitutional law as law was embodied in Justice Stevens's statement, and it's one that makes me feel optimistic rather than pessimistic about these seeming inconsistencies. Thank you very much. (*Applause*)

President Ramo: Well, that was extraordinary. Who knew how sexy preemption could be? (*Laughter*)

Kathleen has indicated that she will happily answer a few questions. If anybody has one, will you raise your hand. We have a microphone for you.

Professor Barbara Moses (N.Y.): Congratulations on your win in the vaccine case. That must have been very exciting.

You mentioned the Westboro Baptist Church case. The sole dissenter in that case, I believe, was Justice Alito, who is generally considered part of the, scare quotes, conservative link. At his Law Day speech in New York, Justice Stevens, former Justice Stevens indicated that he would have agreed with Justice Alito in dissent in the Westboro Baptist Church case. Does this fit in with theory number one, theory number two, or theory number three?

Ms. Sullivan: No, none of the above. (*Laughter*)

I think that Justice Alito clearly is a vigorous advocate of freedom of speech in some cases, and sometimes he is alone in going for a super-strong conception of freedom of speech. He found that forced disclosure of the names of petition signers in Washington referenda raised greater First Amendment concerns than other Justices found [see Doe v. Reed, 130 S. Ct. 2811, 2822-2827 (2010) (Alito, J., concurring)], so sometimes he's a super strong advocate of freedom of speech. Not so much in the animal-fighting video case [United States v. Stevens, 130 S. Ct. 1577 (2010)], for example, where a conception of social order, social fabric, social decency, which is also part of a conservative tradition in some sense, maybe a Burkean one, that I think dominates his concern for freedom of speech, where he thinks a society is degraded by certain kinds of things like animal-fighting videos [See *Stevens*, 130 S. Ct. at 1592-1602 (Alito, J., dissenting)] or the idea that someone would desecrate a soldier's funeral in front of his family with a political protest about gay rights being too prominent in the United States [See *Snyder*, 131 S. Ct. at 1222-1229 (Alito, J., dissenting)].

But I do think you can explain Justice Stevens's remark, and I'm glad you were at the Law Day speech, it was quite extraordinary, and it was a wonderful evening with him. I think Justice Stevens, having been the only serving member of the Court who had had military service, he of course served valiantly in the Navy in Honolulu after the bombing of Pearl Harbor, and he, I think, systematically had a view in military-related cases that favored a certain view of the military.

You can just tick them off. He thought you could make Captain Goldman take off his yarmulke in Goldman against Weinberger [475 U.S. 503, 510-513 (1986) (Stevens, J., concurring]; he didn't think there was a problem in Rostker v. Goldberg [453 U.S. 57 (1981)] with keeping women out of the draft, even though he was for gender equality in lots of other contexts. And then, most stunningly I think, in the flag-burning cases, Justice Stevens votes in the minority, both in the *Eichman* case [United States v. Eichman, 496 U.S. 310, 319-324 (1990) (Stevens,

J., dissenting)] and Texas v. Johnson [491 U.S. 397, 436-439 (1989) (Stevens, J., dissenting)], saying there's no free-speech right to burn a flag. It's Justice Scalia who migrates to join Justice Brennan in the pro-free-speech side of that. Justice Stevens, having served under the flag as a soldier, having a deep concern with military honor, voted for military honor against the First Amendment in cases like flag burning and said he would have done so in Westboro Baptist Church. Here I think the point is it was a military funeral, it was a funeral of a soldier who had served, and that was a particular form of what I think he would have thought was an egregious desecration that didn't need to be protected by freedom of speech. So that's kind of the footnote to the Stevens exceptional military position across a line of cases.

President Ramo: One more questioner. Why don't we go over there.

Professor Herma Hill Kay (Cal.): Thank you, Kathleen, for one of your more provocative and informative speeches. It's always a pleasure to listen to you.

The question that I want to ask may be slightly off point, because the case I want to ask you about isn't really a constitutional case. But I am wondering whether, if you look at *Wal-Mart* [Wal-Mart Stores, Inc. v. Dukes, 564 U.S. ___, 131 S. Ct. 2541 (2011)] and the lineup on the class-certification question in light of the three principles you have outlined, under the second principle it seems fairly clear that a concern with the civil litigation would be at work there on one side. How would your third principle respond to that case if it's part of your sort of overall view?

Ms. Sullivan: Well, thank you, Herma, very much for your kind words. I do think you could extend what I have said today about constitutional law to lots of other areas of law. I have suggested that I think the Roberts Court, across a wide variety of areas, has taken interpretations of statutes and rules in a direction that makes barriers to civil litigation greater: the *Iqbal* [Ashcroft v. Iqbal, 556 U.S. ___, 129 S. Ct. 1937 (2009)], *Twombly* [Bell Atlantic Corp. v. Twombly, 550 U.S. 544

(2007)] interpretation of Rule 8 [Fed. R. Civ. P. 8]; the *Tellabs* [Tellabs, Inc. v. Makor Issues & Rights, Ltd., 551 U.S. 308 (2007)] pleading requirements for scienter under 10(b); interpretations of patent law, interpretations of antitrust law to get rid of bright-line rules that favored plaintiffs in favor of more balancing and more discretion for judges; *Morrison* [v. National Australia Bank, Ltd., 130 S. Ct. 2869 (2010)] not finding implied rights of action for foreign-based challenges to companies listed on foreign exchanges challenged by foreign investors.

There's a whole sweep of areas, across a whole lot of doctrinal areas, in which the answer has been, sometimes lopsidedly, with Justices Ginsburg or Souter writing these decisions, too, has been to make civil litigation more difficult for plaintiffs. Class actions may be this Term's sequel to those lines of cases in the *Wal-Mart* case in which the Court may, it seems likely to after the argument, read Rule 23 [Fed. R. Civ. P. 23] restrictively with respect to very large classes with disparate circumstances that can't be linked through the mere fact of discretion.

I can't help but think that Rule 23 is maybe somewhere in the sequence of cases in which the concern that civil litigation has gotten too loose and too easy will now be expressed with respect to class actions. That's principle number two.

Theory number three would say—and I don't mean to be normative about it, I just mean to be descriptive—theory number three would say that the function of these re-equilibrating doctrines is to correct where a balance of values has tilted too far to one side. Now you might disagree whether class actions have gotten out of control, have become too much of a deadweight social loss, or have ceased to have their value as great vehicles for private attorneys general, for people who couldn't afford individual representation, you might agree or disagree with that, but someone who took the third theory would say that these interpretations function in history as corrections of a recent trend, so that would be what I would say there.

Thank you for your kind words. It's always wonderful to see you.

President Ramo: One more question. The gentleman in back.

Mr. Edward Labaton (N.Y.): I would assume that various decisions can be fit into different of the three paradigms. For example, a case that you didn't mention that was probably, perhaps, the most celebrated case at the end of the century was Bush against Gore [531 U.S. 98 (2000)], and it seems to me that the majority opinion, which said that they cited, they relied upon the Equal Protection Clause and then said that that interpretation could not be used in any other case, could, as to them, only fit into the first category and none other, because when you say that, you're basically unprincipled. (*Laughter*)

Ms. Sullivan: Well, I try never to talk about Bush against Gore for just the reason you say. I did try to use it in litigation years ago and was basically told it was just a ticket good for that one train on one day, and it didn't apply to my case through jujitsu. So I feel some pain when you describe it, but I think it has to be explained in other ways. I think the Justices who joined the majority in that case sincerely believed that it was an act of statesmanship designed to stop a cascading political crisis that would have made us seem silly in the eyes of the world. You might agree or disagree, but I don't think it was conceived of according to theory number one, because I don't think anybody really does judging under theory number one. But it may be a footnote case, a little bit like Justice Stevens's military cases.

Anyway, I know you have meetings to get to. Thank you very much for having me here. It's been an honor. (*Applause*)

President Ramo: Well, let me make just a note about the culture of The American Law Institute. Only at The American Law Institute would meals be a place for the most provocative intellectual discussion. Only at The American Law Institute would the Dean of Berkeley speak with such reverence to the Dean of Stanford and be responded to in equal ways. (*Applause*)

And let me just say also, to keep those of you who thought we were going to start Nonprofits just beginning at 2:00 o'clock from rushing the podium, since at the moment the President of the ALI has no security, that we will give everyone an opportunity to say what they have to say starting at the beginning in about four minutes. Thank you.